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ESMA
CS 60747
103 rue de Grenelle
75345 Paris Cedex 07, France

Deutsche Bank AG
Winchester House
1 Great Winchester Street
London EC2N 2DB

Tel: +44 20 7545 8000

Direct Tel +44 20 7545 8380
Direct Fax +44 20 7547 4179

Re: ESMA's consultation paper on draft technical standards on the Market Abuse Regulation (2014/809)

Dear Sir or Madam,

Deutsche Bank welcomes the opportunity to provide comments on the above consultation. Overall, we find ESMA's proposals balanced. We do have some suggested amendments which we believe would increase the effectiveness of the framework.

A requirement for issuers to report to each competent authority during stabilisation periods is unnecessarily duplicative. It could result in fragmentation in the EU single market and increase the scope for reporting errors. We would instead support a requirement for issuers to report to one competent authority which then conveys the information to all other competent authorities.

We welcome ESMA's clarification that Suspicious Trade and Order Reports (STOR) should be submitted as soon as possible once reasonable suspicion of a breach has been formed. We still have concerns however about the indicative two weeks cited and think that it should instead require reports to be submitted without delay. Identifying instances of suspicious activity requires extensive investigatory work and the rules should encourage more in-depth investigations, rather than penalise them.

Finally, we think that information contained in reports to regulators on persons discharging managerial responsibilities (PDMRs) should be limited to professional information. Requiring the reporting of personal information runs the risk of unintentional disclosure and data protection concerns. We have similar concerns around the personal information required with regards to insider lists.

We would be happy to discuss further any of the above points or any other issues raised in our response. Please let us know if we can provide further information.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Daniel Trinder'.

Daniel Trinder
Global Head of Regulatory Policy



Draft technical standards on the Market Abuse Regulation - ESMA/2014/809

Buy-backs and stabilisation: the conditions for buy-back programmes and stabilisation measures

We welcome ESMA's approach to maintain broad consistency with Regulation 2273/2003 when determining the conditions for buy-back programmes and stabilisation measures. These rules have worked well in practice, as set out in our response to the Discussion Paper (ESMA/2013/1649). Before answering the specific questions we would like to point out the following:

We believe the statement in paragraph 6 of the draft technical standards that the specific purposes listed under Art. 5(2) MAR (Regulation 596/2014) of the sole legally allowed purposes for a buy-back programme should be clarified. Under corporate law, particularly Directive 2012/30/EU, the acquisition of own shares by a company is also permitted for other purposes. While the safe harbour under MAR is indeed limited to the purposes listed in Article 5(2) of MAR, this does not mean that buy-back programmes for other purposes constitute market abuse, although they are not covered by the safe harbour under MAR. We would welcome a clarifying statement to that effect.

Q2: Do you agree with the approach set out for stabilisation measures? If not, please explain.

Overall, we agree with the approach set out for stabilisation measures, particularly as it is consistent with the established regime under Regulation 2273/2003. We also welcome the guidance provided regarding the scope of the pre-stabilisation disclosure and the attribution of the disclosure obligations to the entity undertaking the stabilisation.

There are, however, some aspects that could be improved further when adopting the new regulatory technical standards replacing Regulation 2273/2003:

- a) Restrictions regarding the time of stabilisation measures (para. no. 33 of the draft technical standards)

We appreciate that the concepts existing under Regulation 2273/2003 are being maintained. However, we would welcome some adjustments or clarifications on issues where the current regime has caused some uncertainties.

The distinction between an "initial" offer and "secondary" offer is not entirely clear, especially in the case of an offer of new shares from a capital increase of a listed issuer. In accordance with market practice, a distinction should be made with regards to the offered class of shares; i.e. if the offered class has not been traded yet, it is an "initial offer"; if the offered class is already being traded, it is a "secondary offer."

In certain offer structures there is no "allotment" in line with the term defined in the draft RTS; hence the determination of the end of the stabilisation period according to Article 6 paragraph 4 of the draft RTS (as under Article 8 paragraph 3 Regulation 2273/2003) cannot be made. For example, in the case of a fixed price rights issue of a German stock corporation, the number of securities to be received by investors is often already fixed at the beginning of the offer, i.e. before the offered shares can be subscribed. In



transactions of this type, market practice usually makes reference to the date when the subscribed shares are credited to the investors (see, for example, Feuring/Berrar in: Habersack/Mülbert/Schlitt, Unternehmensfinanzierung am Kapitalmarkt, 3rd. ed. 2013, § 39 no. 40). Hence, we propose to add that – in cases where there is no “allotment,” the stabilisation period should end – in line with the date for the end of the stabilisation period for debt instruments – “30 calendar days after the day on which the issuer or selling shareholder received the proceeds of the issue”.

b) Disclosure and reporting obligations (no. 38 et seq. of the CP)

The reference in paragraph 45 of the draft technical standards to Article 23 MiFIR should instead refer to Article 25 and 26 as in Article 7 paragraph 2 of the draft RTS. The reference to Article 25 paragraph 2 MiFIR should be deleted as it relates to record keeping obligations of the operator of a trading venue (and not a securities firm).

With regards to stabilisation measures of relevant listed securities in different countries, ESMA's preferred approach calls for direct reporting to each competent authority. Requiring market participants to make multiple reports for the same set of facts increases the risk of human and or operational error. A more effective approach would involve EU competent authorities establishing a system that would allow information provided to one competent authority to be shared with other competent authorities automatically. This would streamline the distribution of information in the single market by allowing market participants to make one disclosure to a single competent authority. The failure to implement such a system will result in a reporting regime that is both duplicative and burdensome.

c) Sell side trading and “refreshing the greenshoe” (no. 54 et seq. of the CP)

We agree that a sell transaction cannot be covered by the safe harbour under Article 5 MAR as it does not fall within the definition of “stabilisation” in Article 3 (2)(d) MAR. We would welcome clarification however, that such sell transactions will not necessarily be characterised as abusive. Furthermore, we do not agree with the position that any further acquisitions conducted for stabilising purposes after such sell transactions having been effected should no longer be covered by the safe harbour under Article 5 (1) MAR. In a volatile market such stabilisation may become necessary to avoid the respective securities being exposed to market volatility during the stabilisation period. These purchases are covered by the definition of stabilisation and – especially if the possibility of such further stabilisation after a potential “refreshing” sale has previously been adequately disclosed to the public – such stabilising transactions should not be treated differently compared to the initial stabilisation prior to “refreshing” taking place. This practice was generally accepted in legal literature (in Germany for example) before CESR published its third set of level 3 guidance and is still strongly supported by market participants. In light of the market benefits provided by these transactions, it would be advisable to return to the previous interpretation.



Market soundings

Q3: Do you agree with ESMA's revised proposals for the standards that should apply prior to conducting a market sounding?

We support ESMA's proposals. We would also like to make the following comments:

a) Clarification on Block Trades (para. 69 of the draft technical standards)

With regard to the statement that when "trying to conclude" a transaction, Article 11 will not apply, we would welcome clarification on how privately executed transactions will be treated.

Recital 23 of MAR states insider dealing consists of an unfair advantage being obtained from inside information to the detriment of third parties who are unaware of such information. Recital 24 specifies that a person has infringed on the prohibition on insider dealing when they have misused inside information. As a result, it is widely regarded as an acceptable structure under MAD (and the same principles should apply, given the foregoing understanding set out in Recitals 23 and 24) that in bi-lateral transactions, where both counterparties to a sale and purchase of securities have the same level of information, none of them uses information to effect a transaction to the disadvantage of the other. Although this follows from the aforementioned recitals, we believe an explicit confirmation of that understanding by ESMA would be helpful, for ensuring a consistent regulatory approach across the EU.

This should apply in two situations. First, when the information that is exchanged between the seller and the buyer is only trading information, i.e. limited to the fact that a sale is happening and the technical details such as number of securities and price. Second, it should also be acceptable for a further exchange of more detailed information in the case of a transaction in a significant stake in a listed company where both the acquirer and the seller of the stake have identical information on the issuer following due diligence. In that case, the acquisition is not prohibited as insider dealing, even though inside information obtained in the course of the due diligence may be used, provided that the acquirer purchases the stake as initially planned prior to the due diligence process (see guidance issued by the German regulator BaFin in its Issuer Guide ("*Emittententleitfaden*"), item III.2.2.1.4.2.).

b) Characterising the information to be disclosed (para. 76 of the draft technical standards)

As regards the statement in paragraph 76 of the draft technical standards that the Disclosing Market Participant (DMP) should determine the expected time period when the transaction is expected to be made public, we would like to point out that a sale of shares (whether of new shares or existing shares) triggers disclosure requirements (i) according to Article 17 MAR with regard to its impact on the issuer (e.g. in the case of the issuance of new shares) and (ii) according to the Transparency Directive with regard to voting rights disclosure thresholds being crossed. Failing those two alternatives, a placement does not necessarily have to be made public (except for post trading transparency under MiFiD).



We welcome the statement in paragraph 80 of the draft technical standards that in case of disagreement among syndicate members, information should be characterised as inside information. This rightly reflects the fact that what constitutes inside information cannot in all cases clearly be determined and such determination may require discretion. Therefore, it appears advisable in case of doubt to treat such information as if it were inside information.

Q4: Do you agree with the revised proposal for standard template for scripts? Do you have any comments on the elements included in the list?

We agree with the proposal for the standard template, but would like to make the following suggestions for further improvement:

With regard to item “iv”, it should be possible to state that the DMP is considering the possibility that the information is inside information and therefore has decided to follow the appropriate procedures. That would reflect the fact that an assessment cannot always be clearly made and that in case of doubt such information should be treated as inside information, as set out above (item 2 of our response to Q3).

In item “v.” there appears to be a mistaken reference to “§ II 2.1,” the document should reference “§ III 2.1”.

With respect to the requirements when potential investors do not wish to receive inside information (paragraph 87 draft technical standards), we continue to believe that Option 1 would be more appropriate. As noted in the Consultation Paper, although the majority of the respondents to the Discussion Paper favoured Option 1, ESMA has chosen to apply Option 2. Option 2 imposes significant operational burdens on DMPs with little additional regulatory benefit. Under Option 1, a potential investor may inform a DMP at any time that it does not want to be wall-crossed or contacted further. Most DMPs will respect and follow the wishes of their clients within the parameters of the law because it is in the DMPs best interest to do so. Option 2 is overly broad in that it views an investor as one single entity, when in fact there are numerous persons at an investor responsible for various business divisions that may be interested in learning of new investment opportunities. Furthermore, relevant contacts at potential investors and open disposition to investment ideas may change over time. As a result, there may be a significantly higher opportunity cost if Option 2 is chosen over Option 1. An appropriate balance would be to prohibit DMPs from contacting only those individuals at an investor client who have advised the DMP that they do not wish to be sounded in relation to potential transactions.

In the event that the preference for Option 2 is maintained, it should be clarified that Option 2 imposes no affirmative obligation on the DMP to determine the potential investor’s current and ongoing willingness to receive inside information. The onus should be on the investor to inform the DMP that it does not wish to be sounded in relation to potential transactions.

As regards the standard template, we propose adding under “iv.c” that it remains the market sounding recipient’s responsibility to make his own assessment of whether, based on his actual knowledge, he may still be an insider.



Q5: Do you agree with these proposals regarding sounding lists?

We agree.

Q6: Do you agree with the revised requirement for DMPs to maintain sounding information about the point of contact when such information is made available by the potential investor?

We agree.

Q7: Do you agree with these proposals regarding recorded communications?

We agree.

Q8: Do you agree with these proposals regarding DMPs' internal processes and controls?

We agree, based on our understanding that the “need to know” basis on which information may be shared with other employees includes, where necessary, the required infrastructure and control functions. Such required infrastructure and control functions include, Legal, Compliance, and risk management such as Credit Risk Management, Market Risk Management, Operational Risk Management or Finance.

As regards cleansing (§ III.7), a possible option would be to state at the outset of the market sounding that if a transaction is neither launched nor announced until a certain point in time the investor may assume that it will no longer be pursued.

Accepted Market Practices

The reference in paragraph 145 of the draft technical standards to “simultaneous release of information through the interested parties’ web pages” may create confusion because it is unclear who “the interested parties” are and how a “simultaneous” release is to be achieved. Disclosure through the trading platform or relevant NCA should be sufficient.

In paragraph 162 of the draft technical standards the requirement that the notification should detail the “rationale why the practice would constitute market manipulation” should be reconsidered. If a proposed AMP is a practice that has been applied in the past, market participants will be reluctant to make such a statement and, as a result, refrain from requesting a practice being established as an AMP. Market participants should not be required to start the application and review process and be forced to state that such activities constitute market manipulation. We propose clarifying that the procedure to establish an AMP can (and should) also be used as a tool to overcome residual uncertainties and to establish more transparency in practices that are deemed acceptable at a national level.

Q9: Do you agree with ESMA's view on how to deal with OTC transactions?

We agree. As mentioned previously however, we do have reservations as to the effectiveness of the process given applicants would be required to state why a particular practice constitutes market abuse.



Q10: Do you agree with ESMA's view that the status of supervised person of the person performing the AMP is an essential criterion in the assessment to be conducted by the competent authority?

We agree.

Suspicious transaction and order reporting

Q11: Do you agree with this analysis regarding attempted market abuse and OTC derivatives?

We agree that suspicious trades and orders, including those in OTC derivatives, must be reported. It should be clear however, that the measures proposed in Article 16 include interpreting the term “attempt” in the same manner as the corresponding substantive criminal law, either as laid down in the respective Member States or as set forth in Article 11bis of the Corpus Juris; the interpretation of the term “attempt” should not be broadened for purposes of STOR reports.

MAR intends to prohibit insider trading or market manipulation at any stage, including attempt. However, in doing so, it foregoes a legal definition of attempt, but gives some guidance in recital 41:

“In order to complement the prohibition of market manipulation, this Regulation should include a prohibition against attempting to engage in market manipulation. An attempt to engage in market manipulation should be distinguished from behavior which is likely to result in market manipulation as both activities are prohibited under this Regulation. Such an attempt may include situations where the activity is started but is not completed, for example as a result of failed technology or an instruction to trade which is not acted upon. Prohibiting attempts to engage in market manipulation is necessary to enable competent authorities to impose sanctions for such attempts.”

It is clear from this guidance and the examples that the term “attempt” must be clearly defined and distinguished from other activities. This is particularly important given that the definition of attempt also serves as grounds for criminal prosecution. EU laws do not establish such a clear definition, but leaves this to the laws of Member States. It is only the draft definition of Article 11bis of the Corpus Juris which provides that a person is guilty of attempt if the person has the intention to commit an offence and does an act which indicates the beginning of the offence.

In view of these considerations, the requirement “it is necessary to report suspicious orders whether or not they have been executed (e.g. where a firm has refused to place an order for a client)” is too broad as it would include instances where the firm refuses the client's initial suggestion or where a concept has not been finalised nor materialised and constitutes intent. In line with the spirit of recital 41 of MAR, the term “attempt” should be defined to include activity that is taken in furtherance of the goal of market manipulation, and not simply be assumed to be activity that could result in manipulation.



Q12: Do you agree with ESMA's clarification on the timing of STOR reporting?

We welcome the clarification that STORs must be submitted as soon as reasonable suspicion has been established. We still do have some concerns about the indicative timeline of two weeks. The process of investigating a suspicious trade or order will vary depending on the circumstances of each case. Placing a two-week limit on the operators of trading venues to conduct their investigations could lead to incomplete analysis. This will be further complicated in cases where the suspicious activity in question took place in the OTC market requiring trading venue operators to investigate activity taking place outside their platform. Instead of a defined or indicative timeline, market operators should be required to submit STOR reports "without delay once reasonable suspicion has been formed."

Technical means for public disclosure of inside information and delays

Q20: Do you agree with ESMA's proposals regarding the format and content of the notification?

We agree.

Q21: Do you agree with the proposed records to be kept?

We agree.

Insider list

Q22: Do you agree with ESMA's proposals regarding the elements to be included in the insider lists?

The information required to be included on the insider's list is overly broad and raises significant data protection concerns. According to recitals 56 and 57 of MAR, insider lists are required in order to enable issuers to monitor the flow of information, to identify insiders and to enable the competent authorities to contact them with further inquiries. Requiring private home and mobile numbers as well as a private e-mail address is not required to accomplish these goals. The standard set out in the Draft Technical Standards risks infringing the protection of personal data guaranteed by Article 8 of the Charter of Fundamental Rights of the European Union. Contact details should be limited to the business address of all relevant insiders.

Regarding paragraph 298 of the Consultation Paper, clarification would be welcome that notwithstanding the obligation to include all persons with access to inside information, it is sufficient to include third parties by reference to the legal entity or the natural person. This is the current status, and a justification to significantly widen the scope has not been presented. Any person acting on behalf or on account of the issuer is already required to keep an insider list separately and independently (Article 18 paragraph 1 MAR).



Furthermore, individuals listed on an insider list should be expressly notified of that fact so that they can take appropriate measures to protect themselves against unjustified suspicion if such entry turns out to be incorrect or outdated.

Q23: Do you agree with the two approaches regarding the format of insider lists?

We agree with the proposal to allow issuers to choose between the established various techniques to set up and keep an insider list.

Although it is valuable to delineate general lists consolidating all the projects or events, and deal with specific insider lists as set forth in paragraph 302 of the draft technical standards, it must also be clear that issuers may also keep a function / department specific list. Such a list would be structured from those corporate functions or departments where inside information may typically arise, which implies that no concrete inside information is recorded (for example, see BaFin, Issuer Guidelines, 4th ed. 2011, p. 99).

Such a practice is required by Article 18 paragraphs 1 and 2 MAR which does not distinguish between actual and potential knowledge of inside information, considering that the selection of persons to be included is based on “access to inside information” and that only a “reason for including that person on the insider list” must be recorded. Issuers ought to be left with discretion to identify those functions and departments as long as the purposes set forth in recitals 56 and 57 are met. Relevant corporate functions may be, inter alia, the Management Board, the Supervisory Board and the Legal, Controlling, Finance, Investor Relations, or Compliance departments. Such function specific lists would reflect that inside information does not necessarily arise from deals or transactions, but also from events and effects that either are recurrent (e.g. external reporting) or typically arise at senior level within the issuer.

Paragraph 305 of the draft technical standards supports and implicitly assumes, the extensive use of electronic systems resulting from, e.g., market surveillance. We would welcome clarification that such systems need not encapsulate all information required in accordance with technical standard at any time, but have to enable the issuer to provide the insider list to the competent authority as soon as possible upon its request (Article 18 paragraph 1 lit. c MAR). This is to reflect that many issuers have to comply with EU data protection rules that require limitation on the storage of personal data on a strict need to know basis.

Manager’s transactions format and template for notification and disclosure

Q24: Do you have any views on the proposed method of aggregation?

We agree with the preference for option 3 to provide a single set of data for each trading day (paragraph 334 and 335). However, we do not agree with the suggestion to disclose the highest and the lowest prices in addition to the weighted average price as it is not clear how this information effectively informs investors. In most cases, the fact that a PDMR has engaged in a transaction is the most important factor, the pricing of the transaction (as long as it is within the market price) will be of little relevance.



Q25: Do you agree with the content to be required in the notification?

It is unnecessary to oblige PDMRs and closely associated persons to provide their private address to the competent authority. Notwithstanding that the authority is the only recipient, the disclosure will still disseminate the manager's confidential personal data within the organisation of the issuer, external service providers, and the competent authority, which could put the personal security of particularly prominent PDMRs at risk of disclosure. Also, this information would not sufficiently further the goals set forth in recital 58 of MAR.

Investment recommendations

Q26: Do you agree with the twofold approach suggested by ESMA of applying a general set of requirements to all persons in the scope and additional requirements to so-called “qualified persons” and “experts”?

We agree.

Q27: Should the issuance of recommendations “on a regular basis” (e.g. every day, week or month) be included in the list of characteristics that a person must have in order to qualify as an “expert”? Can you suggest other objective characteristics that could be included in the “expert” definition?

Yes, we agree where the “on a regular basis” test is part of a larger list of characteristics that would be considered in determining expert status. Additional factors to consider are the frequency with which an individual works on a particular topic or business area, an individual's level of education, an individual's work history.

Q28: Are the suggested standards for objective presentation of investment recommendation suitable to all asset classes? If not, please explain why.

We agree.

Q29: Do you agree with the proposed standards for the objective presentation of investment recommendations and how they apply to the different categories of persons in the scope? If not, please specify.

We agree.

Q30: Do you agree with the proposed standards for the disclosure of interest or indication of conflicts of interests and how they apply to the different categories of persons in the scope? If not, please specify.

It would be helpful to further specify the level of disclosure a disclaimer must meet to be deemed “proper and effective”. The examples mentioned under paragraph 404 of the draft technical standards depict widely discussed cases of concern and doubt. We note that Article 5 paragraph 3(a) of the draft technical standards supposes the disclosure of an “actual holding in the financial instruments to which the recommendation relates” which should constitute an appropriate disclosure within the meaning of Article 20 paragraph 1 of MAD. Against this background, it would also be valuable to be assured



that such a disclosure *simultaneously* fulfils the elements of Article 12 paragraph 2(d) of MAD, where a disclosure “to the public in a proper and effective way” exempts the disclosing party from a finding of market manipulation. A uniform understanding of these terms would increase the consistency of MAD and avoid misconceptions among market participants about the applicability of related, or overlapping, rules.

Q31: Do you consider the proposed level of thresholds for conflict of interest appropriate for increasing the transparency of investment recommendation?

We would support amendments to the thresholds currently proposed. Paragraph 393 of the draft technical standards states that the objective is to “...ensure the objectivity and reliability of the investment recommendations produced by qualified persons...”, and that positions disclosed should represent “...significant financial interests...”. We agree that 5% may be too high for a threshold, however a 0.5% threshold would not provide added value in an assessment of potential conflicts of interest and would mean that for organisations with larger capabilities, disclosures would be made almost continuously thus reducing the effectiveness of the disclosure to the reader or recipient of the recommendation. Company law requirements for ownership disclosure vary across member states with the median disclosure threshold being 3%. This could provide an appropriate level to ensure objectivity is maintained in investment recommendations and it would not be onerous to implement.

Q32: Do you think that the positions of the producer of the investment recommendation should be aggregated with the ones of the related person(s) in order to assess whether the threshold has been reached?

In general, aggregating these positions would only result in ensuring the objectivity and reliability of the investment recommendations if the position(s) in question are held in one distinct part of an organisation that would or could influence the recommendation provided in another. If there are other effective measures in place to ensure this influence is not exerted (e.g. Chinese Walls or Information Barriers), the aggregation of the positions is not necessary.

Q33: Do you agree that a disclosure is required when the remuneration of the person producing the investment recommendation is tied to trading fees received by his employer or a person related to the employer?

We agree.

Q34: Do you agree with the proposed standards relating to the dissemination of recommendation produced by third parties? If not, please specify.

We agree.